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SUPREME COURT OF THE STATE OF NEVADA

No. 3526

HAROLD B. LAGEMANN
Plaintiff and Respondent,

vs.

CORA L. LAGEMANN,
Defendant and Appellant

JURISDICTIONAL STATEMENT

I

(a) Statutory Provision Believed to Sustain the Jurisdiction of the Supreme Court of the United States

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States to which an appeal is sought, is Section 237(a) of the Judicial Code of the United States (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54), 28 USC 344(a).

(b) Statute of the State of Nevada, the Validity of Which Is Involved

The statute of the State of Nevada, the validity of which is involved, is Section 9467.06, Nevada Compiled Laws Sup-

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plement, 1931-1941 (Chapter 23, Statutes of Nevada, 1939, page 16). Set forth verbatim, it is as follows:

> Section 9467.06. ADDITIONAL CAUSE FOR DIVORCE. Sec. 1. Divorce from the bonds of matrimony may be obtained, in addition to the causes now provided by law and subject to the same procedure and requirements, for the following cause:
>
> When the husband and wife have lived separate and apart for three consecutive years without cohabitation the court may, in its discretion, grant an absolute decree of divorce at the suit of either party.
>
> (Sect. 2) All acts and parts of acts in conflict herewith are hereby repealed.
>
> (Sec. 3) This act shall become effective upon its passage and approval.

(c) Date of Judgment Sought to Be Reviewed and Date of Application for Appeal

The date of the judgment of the Supreme Court of the State of Nevada, sought to be reviewed, is August 26, 1948. A petition for rehearing was duly filed, which was overruled and denied September 18, 1948, making the judgment final on the latter date. This application is presented not later than December 13, 1948.

II

General Statement of Case and Nature of Adverse Rulings in the State Courts

This is an action for divorce by a husband from his wife. The husband has been successful in obtaining a decree from the courts of Nevada and the wife, who has contested the proceedings in Nevada, seeks a review by the Supreme Court of the United States.

The parties, residents of the State of Illinois, became man and wife by virtue of a marriage ceremony under the

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law of the State of Illinois performed at Alton, Illinois, on February 15, 1930. Two children were born of the marriage.

Following their marriage, the parties lived together as man and wife until June 10, 1937, when, on petition of the husband, the wife was adjudicated as insane by the County Court of Madison County, Illinois, and ordered confined in the State Hospital at Alton, Illinois, a public institution for the care of the mentally deranged.

The wife was subsequently conditionally released from the State Hospital to the care of her brother, who was later appointed her Conservator by the Probate Court of Madison County, Illinois. After her release, she lived with her brother on his farm in Madison County, Illinois; marital relations with the husband were never resumed.

On June 12, 1942, while the wife was still under the insanity adjudication, the husband, a resident of Madison County, Illinois, filed in the Circuit Court of Madison County a suit for divorce from his wife, alleging that she had been guilty of extreme and repeated cruelty towards him. Suggestion of the wife's insanity being made to the court by the wife's brother, the court appointed Emerson Baetz, a member of the bar, as her guardian ad litem; and Baetz filed in her behalf an answer denying the cruelty alleged in the husband's complaint, and also a counterclaim for separate maintenance for the wife. The cause was heard by the Circuit Court of Madison County, Illinois, on December 29, 1944, and the husband's suit was dismissed and the wife was granted a decree of separate maintenance, requiring the husband to pay $75.00 per month for her support. Subsequently, on October 11, 1945, the monthly allowance was reduced to $50.00 per month; and on January 22, 1947, it was increased to $100.00 per week.

On June 6, 1947, the husband appeared in the office of the Clerk of the Eighth Judicial District Court of the State

of Nevada, at Las Vegas, Nevada, and filed a complaint for a divorce from the wife on the sole ground that the parties had lived separate and apart for more than three consecutive years "last past and immediately preceding the commencement" of the action. Constructive service was had on the wife in Madison County, Illinois; she appeared, however, by her Conservator and Guardian ad litem and answered the complaint. In her answer, she contended, inter alia,—

(a) that the Nevada statute for divorce on three years' separation, if construed to authorize the discretionary granting of a dissolution of the marriage relation without regard to any fault on the part of the protesting spouse, was unconstitutional as a law impairing the obligation of a contract within the prohibition of Article I, Section 10, of the Constitution of the United States;

(b) that the Nevada statute for divorce on three years' separation, if construed to authorize the discretionary granting of a dissolution of the marriage relation without regard to any fault on the part of the protesting spouse, was unconstitutional as depriving the protesting spouse of her property rights by virtue of the marriage without due process of law within the prohibition of Article XIV, Section 1, of the Amendments to the Constitution of the United States;

(c) that the Nevada statute for divorce on three years' separation, if construed to authorize the discretionary granting of a dissolution of the marriage relation notwithstanding that the separation was under a decree of an Illinois court of competent jurisdiction, was unconstitutional as requiring the refusal of full faith and credit to the Illinois decree, in violation of the requirement of Article IV, Section 1, of the Constitution of the United States; and

(d) that she was insane during the separation alleged, and therefore without the mental capacity to

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comprehend separation, and that the Nevada statute for divorce on three years' separation did not comprehend a separation occasioned by the insanity of one of the spouses.

The husband demurred to the answer. The trial court sustained the demurrer as to all the constitutional points urged, but overruled it as to the contention summarized in (d), immediately above.

Thereupon the husband filed a supplemental complaint, praying a divorce on another ground permitted by the Nevada law, i.e., that his wife had been insane for two years prior to the commencement of the action. However, he retained his original prayer for a divorce on the ground of three years' separation. The Nevada trial court refused the request of the wife that the husband be required to elect as to which of the two grounds was to be the basis of the action.

Thereupon the wife applied to the County Court of Madison County, Illinois, for a hearing with a view to a restoration of her civil rights. The hearing was held, and a judgment finding her sane and restoring her rights was duly entered; and the wife pleaded this judgment in a supplemental answer to the husband's supplemental complaint in the Nevada court.

In each pleading filed by the wife there was repeated the constitutional objection urged by her in her original answer. It was stricken from the subsequent pleadings by order of court.

Upon trial in the Nevada lower court, the husband abandoned the prayer for divorce on the ground of the wife's insanity, and proceeded solely on the ground of a three years' separation. He was successful, and a decree of absolute divorce was awarded him.

The wife thereupon appealed to the Supreme Court of the State of Nevada, in her appeal continuing to insist upon her

constitutional objections. That each of them was considered by that tribunal, and ruled upon, is clear from the opinion, a copy of which is annexed. In some respects, the rulings were not responsive to the exact nature of the points urged; but the court declined to be moved by a petition for rehearing pointing this out, and the opinion stands.

The federal questions sought to be reviewed by the appeal now prayed were raised by (1) pleadings (answer, answer to supplemental complaint, and supplemental answer), (2) argument on demurrer to the answer and to the answer to supplemental complaint, (3) specification of errors on appeal to the Supreme Court of the State of Nevada, (4) brief and argument on appeal to the Supreme Court of the State of Nevada, and (5) petition for rehearing to the Supreme Court of the State of Nevada. The manner in which the questions were passed upon is (1) order of the trial court sustaining a demurrer to the answer, (2) order of the trial court in sustaining a motion to strike parts of the answer to the supplemental complaint, (3) judgment and decree of the trial court awarding a divorce, (4) judgment or decision of the Supreme Court affirming the judgment and decree of the trial court, and (5) order of the Supreme Court denying a petition for rehearing.

III

Statement of Grounds upon Which It Is Contended the Questions Involved Are Substantial

Assignment of Errors I: The Supreme Court of the State of Nevada, in this cause, erred in holding and deciding that Section 9467.06, Nevada Compiled Laws Supplement, 1931-1941; Chapter 23, Statutes of Nevada, 1939, page 16, when applied by the courts of the State of Nevada to authorize the dissolution of a marriage relation on the sole ground that the spouses had lived separate and apart for more than three years, was valid and not repugnant to the provisions

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of Article IV, Section 1, of the Constitution of the United States, notwithstanding that a prior decree rendered by the Circuit Court of Madison County in the State of Illinois, in a cause between the same parties, had in effect authorized such living separate and apart.

In this case a husband, a resident of Illinois, filed a suit in the courts of Illinois to divorce his insane wife, also a resident of Illinois. The wife, through her guardian ad litem, in the same action filed a counterclaim for separate maintenance. The husband's suit was unsuccessful, and his complaint was dismissed; the wife's counterclaim was successful, and a decree for separate maintenance was entered in her behalf. The husband did not appeal from the decree, but subsequently went to the State of Nevada, where he filed a complaint for divorce upon the sole ground that he had lived separate and apart from the wife, "without cohabitation," for three years. For not less than two and one-half of the three years the living separate and apart had been under the Illinois separate maintenance decree. The wife pleaded this fact in the Nevada proceeding, and also urged that to so construe the Nevada statute as to authorize a divorce regardless of the fact would operate to deny full faith and credit to the Illinois decree. The Nevada courts denied her contention and struck her allegation from the record, and proceeded to award the husband a divorce.

It is submitted that this evidences a substantial federal question.

Under the Federal constitution, it is the duty of Nevada to accord the judicial proceedings of the State of Illinois such faith and credit as they have in the State of Illinois.

Article IV, Section 1, Constitution of the United States;
Act of May 26, 1790, c. 11, 1 Stat. 122, as amended (28 U. S. C. Sec. 687);
Barber v. *Barber*, 323 U. S. 77, 65 S. Ct. 137, 89 L. Ed. 82, 157 A. L. R. 163.

Under the law of the State of Illinois, a decree of separate maintenance authorizes the living separate and apart of husband and wife.

Harding v. *Harding,* 198 U. S. 317, 25 S. Ct. 679, 49 L. Ed. 1066;
Floberg v. *Floberg,* 358 Ill. 626, 193 N. E. 456;
Van Dolman v. *Van Dolman,* 378 Ill. 98, 37 N. E. 2d 850.

The husband's successful suit in Nevada was predicated upon a living separate and apart from his wife for three years prior to June 6, 1947, i.e., since June 6, 1944. But from June 12, 1942, to December 29, 1944, there was pending in the Circuit Court of Madison County, in the State of Illinois, a suit for divorce begun by him against his wife while he was admittedly a resident of the State of Illinois, and the law of Illinois not only permits but requires the separate residence of parties to a divorce action during its pendency.

Floberg v. *Floberg,* 358 Ill. 626, 193 N. E. 456.

The living separate and apart of the parties here which is relied upon by the Nevada courts in awarding a divorce to the husband occurred while both were residents of the State of Illinois. It was authorized by the law of the State of Illinois; and a pleading of that authorization was duly filed in the Nevada courts. They ruled it was of no consequence. The ruling is virtually that a course of conduct permitted or even required of its residents by the State of Illinois can be seized upon by the State of Nevada, when one of the parties removes there and resides for six weeks, to free him of his marital obligations.

Assignment of Errors II: The Supreme Court of the State of Nevada, in this cause, erred in holding and deciding that Section 9467.06, Nevada Compiled Laws Supplement 1931-1941; Chapter 23, Statutes of Nevada, 1939, page 16, when applied to permit the dissolution (without fault on the

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part of a protesting spouse) of a marriage contracted beyond the territorial limits of the State of Nevada, and contracted in a jurisdiction where divorce without fault is not provided by law, was valid and not repugnant to the provisions of Article I, Section 10, of the Constitution of the United States.

It cannot be gainsaid that the statement is frequently found in texts and secondary authorities that marriage is not a contract within the impairments clause of the Federal constitution. Examination of the basis United States Supreme Court decisions frequently cited as sustaining such statements, however, discloses that what that tribunal decided was not that marriage contracts are not within the clause, but that the usual and traditional divorce statute, which contemplates fault on the part of the defendant spouse, is not an impairment.

Thus the Dartmouth College Case, 4 Wheat. 629, 4 L. Ed. 629, invariably referred to in this connection, actually asserted, through Chief Justice Marshall:

> " . . . The provision of the constitution (against impairment of contracts) has never been understood to embrace contracts other than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the right of the legislature to legislate on the subject of divorce. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. *When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether the act be constitutional.*" (Emphasis ours.)

Hunt v. *Hunt*, 24 L. Ed. 1109, 131 U. S. Append. cixv, also frequently referred to, does not enunciate a rule other

than that of the Dartmouth decision, and merely quotes from it.

It would seem that the challenged Nevada statute does exactly what is mentioned in the Dartmouth College Case, in that it permits one party virtually to annul the contract without the consent of the other if he is but successful in avoiding cohabitation for the requisite period of time.

Maynard v. *Hill*, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654, in dealing with a legislative divorce granted by the legislature of the Territory of Oregon, used language which concededly points to the exclusion of the impairments of contracts clause as a factor in determining the validity of laws respecting the marital relation. But the dissenting opinion of Mr. Justice Jackson in *Williams* v. *North Carolina*, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, asserts that "All that *Maynard* v. *Hill* decided was that the Territory had jurisdiction to cut off any interest of an absent Spouse in land within its borders." In any event, the point, in view of the confusion which has followed the Williams decisions (*Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1055; *Estin* v. *Estin*, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1078; *Kreiger* v. *Kreiger*, 334 U. S. 555, 68 S. Ct. 1221, 92 L. Ed. 1086), would seem open to further consideration. Marriage is not, of course, an ordinary civil contract; but it is certainly superior, and not inferior, to the latter. It seems inconceivable that the protection which the Federal constitution would throw about a woman's agreement to act as a seamstress for a month would be denied to her contract to fulfill the duties of a wife and mother for a lifetime.

The wife in this case entered into marriage in a jurisdiction which did not provide for the forfeiture of the rights she thereby obtained except as a consequence of her own default in her obligations. That the courts of Nevada, in

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making of her a divorced woman through no fault of hers, have seen fit to award her alimony is no answer, for the same "public policy" which induces that state to free a man from some of his marital obligations after a residence there of six weeks can also operate to induce it to free him of all of his obligations. "We cannot as judges be ignorant of that which is common knowledge to all men. We cannot close our eyes to the fact that certain states make an industry of their easy divorce laws, and encourage inhabitants of other states to obtain 'quickie' divorces which their home states deny them." (Mr. Justice Frankfurter, dissenting in *Sherrer* v. *Sherrer, supra.*)

Assignment of Errors III: The Supreme Court of the State of Nevada, in this cause, erred in holding and deciding that Section 9467.06, Nevada Compiled Laws Supplement, 1931-1941; Chapter 23, Statutes of Nevada, 1939, page 16, when applied to permit the dissolution (without fault on the part of the protesting spouse), at the discretion of the court, of a marriage contracted beyond the territorial limits of the State of Nevada, and contracted in a jurisdiction where divorce without fault is not provided by law, was valid and not repugnant to the provisions of Article XIV, Section 1, of the Amendments to the Constitution of the United States.

The contract of marriage between the parties in the State of Illinois entitled the wife to rights of dower and heirship in her husband's property; to rights of support by him during his lifetime; and to the intangible privileges of a wife and mother, if children were born. Section 9467.06 of the Nevada statutes, as necessarily applied by the courts of that state, would deprive her of these rights (except as *Estin* v. *Estin, supra,* might save some of them) without the suggestion of a default in the performance of her marital obligations and solely at the discretion of a judge 2000 miles from her home.

The rights arising out of the marriage relation are rights within the protection of Article XIV, Section 1, of the Amendments to the Constitution of the United States.

Hubbard v. *Hubbard*, 77 Vt. 73, 58 A. 969, 107 Am. St. R. 749;
Dorrance v. *Dorrance*, 242 Mo. 625, 148 S. W. 94.

And a statute authorizing a judge, in his discretion, to deprive one of such rights should be held invalid as repugnant to the requirements of the cited article and section.

Hubbard v. *Hubbard, supra.*

A statute clothing a court with arbitrary power to deprive one of his property is invalid.

Yick Wo v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.

The Nevada statute in question appears to be administered entirely as a discretionary matter; the comparative rectitude of the parties is held to be immaterial, as is the fact that the courts of another state have made an ajudication upon the marriage relation.

Herrick v. *Herrick*, 55 Nev. 59, 25 P. 2d 378;
George v. *George*, 56 Nev. 12, 41 P. 2d 1059.

Dated this December 4, 1948, and respectfully submitted.

CORA L. LAGEMANN,
Petitioner and Proposed Appellant.

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 3526

HAROLD B. LAGEMANN, *Plaintiff and Respondent,*

vs.

CORA L. LAGEMANN, *Defendant and Appellant*

BRYAN & CORY,
114 N. Third Street,
Las Vegas, Nevada;
Attorneys for Appellant.
RYLAND G. TAYLOR,
Boggs Building,
Las Vegas, Nevada;
Attorney for Respondent.

Opinion

By the Court, BROWN, *District Judge:*

This case involves an appeal from a judgment entered on the 19th day of November, 1947, in favor of the plaintiff and against the defendant, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, in an action wherein Harold B. Lagemann was plaintiff, and Cora L. Lagemann was defendant, and from an Order entered in said Court and cause on the 28th day of November, 1947, denying a motion of the defendant for a new trial. Under the judgment plaintiff was granted an absolute decree of divorce from the defendant upon the ground that the parties to the action had lived separate and apart without cohabitation for a period of more than three years prior to June 6th, 1947, under Section 9467.06, N. C. L. Supplement, 1931-1941, being Chapter 23, Statutes of Nevada, 1939, Page 16, and said plaintiff was awarded the care, custody, and control of the two minor children, Betty

Lou Lagemann and Lila Lee Lagemann, and was required to pay to the defendant the sum of $45.00 per month for her support and maintenance until the further order of the Court. Jurisdiction was reserved by the District Court for the purpose of making such other orders relative to the care, custody, and control and maintenance of the minor children, and relative to the support and maintenance of the defendant, as to the Court may from time to time seem just and proper.

The original complaint filed on June 6th, 1947, by the plaintiff alleged three years separation without cohabitation. Thereafter, an answer was filed by the defendant which admitted that the parties to the action had lived separate and apart for more than three consecutive years prior to the commencement of the action, but alleged that the separation had been without the fault of the defendant; that the separation was without the volition of the defendant, because the plaintiff refused to receive her as his wife; and that such separation was occasioned by the order of the County Court of Madison County, Illinois, wherein the defendant was adjudged insane and committed to the Alton State Hospital for the Insane on June 10th, 1937, and by the plaintiff's refusal to receive her upon her release from said hospital. Eight further separate defenses were alleged in the answer, all of which were demurred to by the plaintiff, which demurrer was sustained as to all except the third defense, which said defense alleged that the defendant was adjudged insane by the County Court of Madison County, Illinois, on June 10th, 1937, and ordered confined in the Alton State Hospital for the Insane; that thereafter, and in 1940, she had improved and was released to the custody of relatives in Madison County, Illinois, and that since June 10th, 1937, the defendant was and now is incompetent under the adjudication of the County Court of Madison County, Illinois, made and entered on June 10th, 1937.

A reply was filed to the answer wherein the plaintiff denied that the separation was occasioned by the order of the County Court of Madison County, Illinois, adjudging the defendant to be insane, and alleged that after the release of the defendant from the said Alton State Hospital

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for the Insane, the plaintiff had every opportunity to resume marital relations with the defendant, but could not do so with safety to himself and minor children, and that the defendant on several occasions had threatened to destroy and take the lives of the plaintiff and the minor children.

Thereafter, a supplemental complaint was filed by the plaintiff wherein insanity was alleged as an additional ground for divorce, under the provisions of Section 9460, subdivision "eighth", N. C. L. 1929, as amended. To the supplemental complaint the defendant filed an answer, in which the defendant again alleged the order entered on June 10th, 1937, in the County Court of Madison County, Illinois, adjudging the defendant to be insane, and ordering her confined in the Alton State Hospital for the Insane, as set out in Paragraph II of the defendant's third separate defense in her original Answer. Also, seven additional further and separate defenses were alleged in the answer to the supplemental complaint. All of these were demurred to by the plaintiff, which demurrer was sustained as to all defenses except the first defense. Thereafter, the defendant filed her supplemental answer in which all of the allegations contained in the original answer, and the answer to the supplemental complaint, were realleged as Paragraph I and in addition Paragraph II set forth the following allegation:

> "States that she is not insane: and that she was not for a period of more than two years immediately preceding the commencement of this action insane, within the meaning of the statutes of the State of Nevada in such cases made and provided; and that she was not insane at the time of the filing of the supplemental complaint herein."

A motion to strike was filed by the plaintiff to the supplemental answer, which motion was granted as to paragraph I, but denied as to paragraph II.

The issues under the pleadings were settled as follows: Original complaint of plaintiff; the original answer of defendant comprising paragraphs I to V of the first defense and the Third defense comprising paragraphs I and II;

the supplemental complaint of the plaintiff; answer to the supplemental complaint, comprising paragraphs I and II of the first defense; reply to the answer; and paragraph II of the supplemental answer.

At the time of the trial no testimony was adduced in support of the supplemental complaint alleging insanity. The case was tried entirely upon issues made by the complaint alleging three years separation without cohabitation, and the answer of the defendant, including paragraphs I to V of the first defense and paragraphs I and II of the third defense, the reply to the answer and paragraph II of the defendant's supplemental answer.

At the very outset it should be noted that at the time of the trial the defendant introduced no evidence whatsoever except the authenticated copy of a judgment made and entered in the County Court of Madison County, Illinois, on the 30th day of October, A. D. 1947, wherein it was ordered "that the said Cora L. Lagemann be, and she hereby is restored to all civil rights." The record is absolutely devoid of any evidence to the effect that the defendant was mentally incapable of returning to and living with the plaintiff as husband and wife after her release from the Alton State Hospital for the Insane, either during the year 1940 or 1941.

The allegation in the answer of the defendant states that she was released in 1940. The testimony of the plaintiff at the time of the trial was to the effect that the defendant was released from the Alton State Hospital for the Insane during the year 1941, and that subsequent thereto she lived with her three sisters in or around Alton, Illinois, as near as a block and a half and not further than two and a half to three miles from the home of the plaintiff; that the defendant came to the home of the plaintiff on numerous occasions subsequent to 1941 to collect alimony, and that the defendant never at any time even suggested a resump-

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tion of marital relations after her release; and that the defendant was rational and normal during all of those years.

Although the defendant alleged incompetency under the third defense of her original answer, she expressly denied incompetency under paragraph II of her supplemental answer, and at the trial established her competency. She therefore waived any and all defenses contained in her original answer regarding the question of mental incapacity. Further, the evidence introduced by the plaintiff at the time of the trial clearly proves that the defendant is now and has been mentally competent since 1940 or 1941, when she was released from the hospital in Illinois.

The testimony of the plaintiff was that the plaintiff and defendant separated on June 10th, 1937, and have continued to live separate and apart without cohabitation ever since said time. This fact is admitted by the defendant.

The parties will be referred to herein as they were in the lower Court.

The Specifications of Error made by the defendant, as the appellant, are as follows:

Specifications of Errors

1. The trial court erred in adopting the findings supported by insufficient evidence to justify the same.

2. The trial court erred in its conclusions that plaintiff was entitled to a decree because of insufficient evidence to justify such finding, because there were no legal findings that plaintiff and defendant lived separate and apart, without cohabitation, for three years immediately preceding the commencement of this action, without fault on the part of the defendant;

3. The trial Court's judgment and decree granting plaintiff a divorce is not supported by, but is contrary to the evidence in that it denies the decree of a sister state authorizing the separation;

4. The Court erred in finding it had jurisdiction to and deciding plaintiff was entitled to a decree of divorce in the absence of legal findings in favor of plaintiff and against defendant upon the issues of fact raised by the pleadings as to plaintiff's residence, defendant's non-residence and the cause for divorce set forth in his complaint.

As to Specification of Error 1, we are satisfied that the evidence in the record on appeal fully supports all of the allegations of the plaintiff's complaint.

With reference to Specification of Error 2, we feel that it has no merit. This Court has heretofore passed upon the very question in the cases of *Herrick* v. *Herrick*, 55 Nev. 59, 26 P. (2d) 378; *George* v. *George*, 56 Nev. 12, 41 P. (2d) 1059; *Jeffers* v. *Jeffers*, 55 Nev. 201, 29 P. (2d) 351; and *Lamb* v. *Lamb*, 57 Nev. 421, 65 P. (2d) 872.

In the George case, the Court held:

> "It is clear that the discretion which the trial Court is called upon to exercise depends not so much upon the comparative rectitude of conduct of the spouses as upon the probability of their being able to live together in such a manner as to be for their best interests, and the best interests of society."

Specification of Error 3 involves a decree of separate maintenance made and entered on the 29th day of December, 1944, in the State of Illinois, requiring the plaintiff to pay to the defendant the sum of $75.00 per month for her support, which decree was later modified on October 11th, 1945, and January 22nd, 1947. This decree of separate maintenance was set forth as a separate defense in the answer, answer to the supplemental complaint, and supplemental answer of the defendant, which allegation was demurred to by the plaintiff, and the demurrer was sustained by the District Court. That a decree of separate maintenance is not a bar to an action for divorce upon the

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ground of three year separation without cohabitation has been definitely settled. *George* v. *George*, 56 Nev. 12, 41 P. (2d) 1059, 97 A. L. R. 983; *Schuster* v. *Schuster*, 23 P. (2d) 559.

Specification of Error 4 is likewise not supported by the record. The lower Court made the following Findings of Fact:

"1. That plaintiff is now and for more than six weeks prior to the commencement of this action, to-wit: since the 13th day of November, 1946, has been an actual bona fide resident and domiciliary of the County of Clark, State of Nevada, actually and physically residing and being domiciled therein during all of said period of time.

2. That plaintiff and defendant intermarried at the City of Alton, State of Illinois, on or about the 15th day of February, 1930, and they ever since have been and still are husband and wife.

3. That there are two minor children the issue of said marriage, to-wit: Betty Lou Lagemann, aged about fifteen (15) years, and Lila Lee Lagemann, aged about eleven (11) years: that said minor children are now in the custody of the plaintiff, and that it is for the best interests of said minor children that their care, custody and control be awarded to plaintiff.

4. That there are no property rights of the parties hereto within the State of Nevada to be adjudicated.

5. That the plaintiff and defendant have lived separate and apart for more than three (3) consecutive years last past to-wit: since the 10th day of June, 1937, and immediately preceding the commencement of this action, without cohabitation.

6. The Court finds upon the allegations and admissions in the pleadings that the defendant was committed to Alton State Hospital at Alton, Illinois, on the 10th day of June, 1937; that thereafter and on the

10th day of June, 1941, the said defendant was paroled from the said Alton State Hospital; that said defendant was never re-committed to said Alton State Hospital and is now and has been for more than three (3) years last past and immediately preceding the filing of the Complaint herein sane and competent; that the said separation and omission to cohabit since June 10, 1941, was not the result of the insanity or incompetency of the defendant; that it is improbable and unlikely that the plaintiff and defendant will be able to live together in such a manner as to be for their best interests and the best interests of society.

7. That the defendant required for her support and maintenance a sum which the Court finds to be the sum of Forty-five Dollars ($45.00) per month; that the plaintiff has the financial ability to pay the said sum and ought to pay it.

8. That the plaintiff has had the care, custody and control of the two said minor children since the 10th day of June, 1937, and that said plaintiff is a fit and proper person to have the care, custody and control of the said minor children subject to the right of reasonable visitation by the defendant."

Further although the record discloses that an order for publication of summons was entered in this action under which the defendant was personally served with summons in the State of Illinois, she appeared personally in the action by her attorneys, in Las Vegas, Nevada, and was represented by counsel at all times during the trial. Therefore, the nonresidence of the defendant is entirely immaterial as she participated fully in the trial of the action.

Among the further and separate defenses alleged by the defendant in her answer, answer to the supplemental complaint, and supplemental answer, which were demurred to by the plaintiff, and also attacked by a motion to strike, which demurrers were sustained and motion to strike granted, were the following constitutional questions:

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The defendant contends that Section 9467.06, N. C. L. Supplement 1931-41, being Chapter 23, Statutes of Nevada, 1939, Page 16, which reads as follows:

> "Section 1. Divorce from the bonds of matrimony may be obtained, in addition to the causes now provided by law and subject to the same procedure and requirements, for the following cause:
> When the husband and wife have lived separate and apart for three consecutive years without cohabitation the Court may, in its discretion, grant an absolute decree of divorce at the suit of either party."

is unconstitutional for the following reasons:

First: That it is repugnant to the requirements of Article I, Section 10, of the Constitution of the United States, in that it is a law impairing the obligation of a contract. In support of this contention the appellant cites the following cases decided by the Supreme Court of the United States, to-wit: *Dartmouth College* Case, 4 Wheaton, 629; 4 L. Ed. 629; *Hunt* v. *Hunt*, 24 L. Ed. 1109.

Upon a careful analysis of these two cases cited by the defendant, it is apparent that they hold directly opposite to her contention. In the *Hunt* case the following statement is made:

> "In the *Dartmouth College* Case, 4 Wheat., 629, it was expressly said by Chief Justice Marshall, in delivering the opinion of the court, that the provision of the Constitution prohibiting States from passing laws impairing the obligation of contracts 'Had never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the Legislature to legislate upon the subject of divorces. Those Acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other.' This

> disposes of the first ground upon which our jurisdiction is invoked in this case. The law complained of simply provides for divorces in certain cases, after hearing by a court of competent jurisdiction."
> *Hunt* v. *Hunt*, 24 L. Ed. 1109-1101.

In the case of *Tipping* v. *Tipping*, 87 F. (2d) 828, the Court said:

> "It has been held by the highest authority that marriage is an institution of society, creating a status which may be regulated and controlled by public law; that legislation affecting the institution or annulling the relation between the parties is not within the prohibition of the Constitution of the United States against the impairment of contracts, or against ex post facto laws. *Maynard* v. *Hill*, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654."

We feel that it is well settled by the highest authorities that the Nevada statute under consideration is not unconstitutional upon the ground hereinabove set forth.

Second: That it is repugnant to the requirements of Article IV, Section 1 of the Constitution of the United States in that full faith and credit is not given to the judicial proceedings had in the State of Illinois, wherein the defendant was awarded a decree of separate maintenance. In support of this contention the defendant cites the case of *Harding* v. *Harding*, 198 U. S. 317, 29 L. Ed. 1066.

The issues involved in this action under the three year separation without cohabitation statute are entirely different from those which were involved in the proceeding in the State of Illinois. All matters which were or might have been litigated in Illinois were not the basis of the litigation in Nevada. The cases of *Eston* v. *Eston*, 92 L. Ed. 1078, and *Kreiger* v. *Kreiger*, 92 L. Ed. 1086, are decisive upon the

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point that the full faith and credit clause of the Constitution of the United States is not violated by the Nevada Statute.

Third: That it is offensive to the due process of law clause of Section 1 of the XIV Amendment to the Constitution of the United States, in that the defendant has been deprived of certain rights arising out of the marriage relation without due process of law. In support of this contention, the defendant cites the following cases: *Dorrance* v. *Dorrance,* 148 SW 94, *Hubbard* v. *Hubbard,* 58, 969.

This action was not tried as a result of a default after constructive service of Summons upon the defendant, but instead by the personal appearance of the defendant in the action and represented by counsel at the time of the trial. The defendant had her day in Court and had every opportunity to present any defense which she legally had the right to do, and participated in all the proceedings. The Supreme Court of the United States in two recent decisions held as follows:

> "It is quite another thing to hold that the vital rights and interests involved in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional facts *made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process, and in which the defendant has participated.*"
> (Emphasis ours).
>
> *Sherrer v. Sherrer;*
> *Coe* v. *Coe,* 92 L. Ed. 1053.

We have carefully reviewed all of the points raised by the defendant and find that the contentions made by the defendant in reference to the constitutionality of the Nevada statute providing a ground for divorce after three years separation without cohabitation, are without merit.

Also, the judgment and decree made and entered by the District Court is fully supported by the record of the trial.

The judgment and decree, together with the order denying the motion for a new trial are hereby affirmed.

MERWYN H. BROWN,
District Judge.

We concur:
HORSEY, *J.*
BADT, *J.*

Eather, C. J., being absent on account of illness, the Governor designated Honorable Merwyn H. Brown, District Judge of the 6th District Court, to sit in his place.

Attest: This is a full, true, and correct copy.

NED A. TURNER,
Clerk Supreme Court and
Ex Officio Official Reporter.

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